



STEPHOE & JOHNSON LLP  
American Indian Practice

Lynn Trujillo\*  
202.429.8049  
ltrujillo@stephoe.com  
\*Admitted in NM only

1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
202.429.3000  
202.429.3902 fax  
www.stephoe.com

Collier Center  
201 East Washington Street  
Suite 1600  
Phoenix, AZ 85004-2382  
602.257.5200  
602.257.5299 fax

November 12, 2001

Defense Acquisition Regulations Council  
Attn: Ms. Angelina Moy  
OUSD(AT&L)DP(DAR)  
IMD 3C132  
3062 Defense Pentagon  
Washington, DC 20301-3062

Re: Public Comments [DFARS Case 2000-D024]

Dear Ms. Moy:

The Indian Financing Act of 1974, 25 U.S.C. §1451 et seq., established the Indian Incentive Program to aid the economic development of American Indian and Alaska Native communities. The Indian Incentive Program provides additional compensation to Federal contractors when these contractors use Indian organizations or Indian-owned enterprises as subcontractors or suppliers. See 25 U.S.C. § 1544 (1999). Although the Indian Incentive Program has historically been underutilized, an increasing number of prime contractors have recently been making use of the program and, consequently, an increasing number of Indian organizations and Indian-owned enterprises have been benefiting from the economic opportunities thereby made available.

Recognizing the growing importance of this program to the achievement of its goal of increasing economic development in American Indian and Alaska Native communities, Congress has recently taken several steps to support the Indian Incentive Program and to encourage its utilization. In the 2000 and 2001 Department of Defense Appropriations Act, Congress

appropriated \$8 million for the Indian Incentive Program. It also required that the program be made available to subcontractors as well as prime contractors. Congress' support of this vital program has been undermined, however, by the DAR Council's recent decision that the Indian Incentive Program contract clause (FAR 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises) should not be used in solicitations and contracts for commercial items (FAR Part 12 procedures).

We strongly object to the DAR Council's decision to bar the use of the Indian Incentive Program clause in contracts for commercial items. The Council's decision to exclude Indian manufactured or supplied commercial items from the Indian Incentive Program effectively limits the Indian Incentive Program to contracts and subcontracts for supplies or services that exceed the simplified acquisition threshold of \$1 00,000.00 and for products that are unique to the Department of Defense. Few, if any, Indian organizations and Indian-owned enterprises are able to compete in these arenas, and, therefore, few will be able to take advantage of this important program.

We have taken this opportunity to address the DAR Council's prior decision to limit the Indian Incentive Program, because the DAR Council gave interested parties no opportunity to comment on this limitation prior to the promulgation of the final rule.<sup>1</sup> The proposed rule, published on November 18, 1999, explicitly permitted the use of the Indian Incentive Program clause in commercial contracts under FAR Part 12 at the discretion of the contracting officer, if there were subcontracting opportunities for Indian organizations or Indian-owned enterprises. The final rule, published on April 13, 2001, does not allow for the Indian Incentive Program to be used in commercial contracts, thereby seriously restricting the application of the Indian Incentive Program. This limitation was added to the final rule without notice and without an appropriate opportunity for comment from effected parties, including tribal governments.

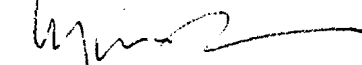
---

<sup>1</sup> The DAR Council's failure to provide an opportunity to comment on the proposed change violates the Administrative Procedure Act. See Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 227 U.S. App. D.C. 201 (D.C. Cir. 1983).

Ms. Angelina Moy  
Page 3  
November 12, 2001

In conclusion, the DAR Council's decision to place limitations on the Indian Incentive Program was wrong. Its decision on the interim rule to expand these limitations to subcontractors at any tier will further negatively impact the program's success. We strongly urge the Council to remove the FAR Part 12 commercial item exclusion from DFARS 52.226-104 and the interim rule DFARS Case 2000-D024.

Sincerely,



Lynn A. Trujillo

